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BEFORE THE

Federal Communications Commission

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In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

PP Docket No. 93-253

TO: The Commission

REPLY COMMENTS OF THE INTERAGENCY GROUP

The Interagency Group (i.e., the New Jersey Highway Authority, the New Jersey Turnpike Authority, the New York State Thruway Authority, the Pennsylvania Turnpike Commission, the Port Authority of New York and New Jersey, the South Jersey Transportation Authority, and the Triborough Bridge and Tunnel Authority)

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November 30, 1993

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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REPLY COMMENTS OF THE INTERAGENCY GROUP

The New Jersey Highway Authority, the New Jersey Turnpike Authority, the New York State Thruway Authority, the Pennsylvania Turnpike Commission, the Port Authority of New York and New Jersey, the South Jersey Transportation Authority, and the Triborough Bridge and Tunnel Authority ("the Interagency Group"), by their attorneys, hereby submit a Reply to certain Comments received by the Commission in response to the Notice of Proposed Rule Making ("NPRM") in the above-captioned matter.

I. Statement of Interest

The seven members of the Interagency Group are toll agencies in the states of New York, New Jersey and Pennsylvania that conduct a combined total of over 1.4 billion toll transactions annually, a figure which represents more than 37% of all tolls transacted in the United States. They have joined together for the purpose of designing and deploying the "E-ZPass Plan," a major effort to implement electronic toll collection in their region.

The E-ZPass Plan, which was initiated in June 1990, calls for eventual implementation of electronic toll collection at all of the

toll river crossings to New York City, other major toll portals providing entry to and egress from central business areas, and points along the major intra- and interstate arteries leading to and from these crossings and portals (i.e., the New Jersey Turnpike, the New York State Thruway, the Garden State Parkway, the Pennsylvania Turnpike, and the Atlantic City Expressway).

Members of the Interagency Group have made budget commitments in excess of \$95 million to partially fund this project for the period 1992-1996, including a commitment to date of \$41 million in federal funds. The use of proven interoperative and compatible automatic vehicle monitoring ("AVM") technology is essential to the success of the Plan, and the Interagency Group is currently in the process of testing two read-write AVM technologies that operate in the 904 to 912 MHz and 918 to 926 MHz bands. The Plan will require AVM radio frequency licenses for some 200 facility sites collecting tolls in some 1600 lanes of vehicular traffic.

The Interagency Group has filed Comments and Reply Comments in the pending FCC rulemaking proceeding concerning proposed revisions to the rules governing AVM service. See NPRM, Amendment of Part 90 of the Commission's Rules to Adopt Regulations for the Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, 8 FCC Rcd 2502 (1993).¹

¹ In light of the substantial impact that the AVM proceeding could have on implementation of the E-ZPass Plan, the Interagency Group urged the Commission to ensure that its revised rules provide the maximum flexibility necessary for users to make cost-effective, performance-based choices among a variety of AVM technologies in a competitive marketplace. The Interagency Group also expressed its

II. Discussion

Based on its review of the NPRM and the initial Comments that were filed with the Commission in the above-captioned proceeding, the Interagency Group submits the following in brief Reply:

Competitive bidding procedures should not be applicable to AVM services because there is no mutual exclusivity among licensees in the 902-928 MHz band and the principal use of the band, under the Commission's criteria, is for private services which do not involve paying subscribers.

Although the Commission states that it will "delay action on the applicability of competitive bidding to [the AVM] service because certain fundamental questions about the nature of this service are now being considered in a separate proceeding," NPRM at p.50, n.153, the Interagency Group agrees with several of the Commenters in this proceeding that competitive bidding should not apply to the AVM service under the current AVM rules or the rules as they are likely to be revised in the pending proceeding because the service will not qualify under the "mutual exclusivity" and "principal use" criteria enacted by Congress for implementation by the Commission in determining the applicability of competitive

concern that the Commission's tentative proposal to abandon the long-standing "shared band" approach to the 902-928 MHz band, in order to segregate "wide-band pulse-ranging" systems from so-called "narrow-band" systems, is inconsistent with the goal of flexibility and based on mistaken assumptions about interference problems and spectrum usage distinctions among existing AVM technologies. In addition, the Interagency Group asked the Commission to address in its rulemaking the special needs of Government and quasi-Government entities that are using AVM technologies to implement electronic toll collection and other advanced traffic management systems under the mandate of the Intelligent Vehicle-Highway Systems Act of 1991.

bidding procedures. See 47 U.S.C. Section 309(j), enacted in Pub. L. No. 103-66, Title VI, Section 6002, 107 Stat. 312, 392 (1993).

The Commission itself notes that a mutual exclusivity of applications, which is a statutory sine qua non for application of competitive bidding requirements, "cannot exist" in many services regulated by the Private Radio Bureau "because the channels are shared by numerous licensees." NPRM, pg. 7, n.3. Comments submitted by the Association of American Railroads (p.2), Southwestern Bell (p.14), and the PacTel Corporation (p.12) identify AVM as a prime example of such a service because its licensees must share the 902-928 MHz band with amateur radio licensees and Part 15 (unlicensed) devices on a secondary basis to the Federal Government and ISM (Industrial, Scientific, and Medical) devices, which are the primary users of the band. As PacTel notes, AVM would not have exclusive use of the band, even assuming AVM is awarded co-channel separation as protection from interference to its signals; such a revision of the rules would not alter the "hierarchy of use" and AVM would remain secondary to the Federal Government and ISM. Id.²

Similarly, the sharing of the 902-928 MHz band in the manner discussed above disqualifies the AVM service from application of

² Although the Interagency Group agrees with PacTel on this general point regarding the nature of the 902-928 MHz band, it has opposed the proposal in the AVM NPRM which, at the urging of PacTel Teletrac, would give wideband pulse-ranging AVM systems "exclusive" use of the 904-912 and 918-926 MHz bands vis-a-vis other competing AVM technologies by excluding so-called "narrow-band" technologies and non-pulse-ranging systems from the use of this spectrum. Such a rule, in effect, would grant by regulation "exclusivity" which should now be obtainable only through competitive bidding.

competitive bidding requirements under the statutory "principal use" criterion. As the Commission proposes to apply it,³ this test would require that "at least a majority of the use" of a Commission regulated service or class of service, either by average users or by the majority of users within a service, must be for providing service to subscribers for compensation rather than for "private service" (i.e., services without paying subscribers). NPRM, p.11. Given the composition and relative status of the various users of the shared AVM band, as discussed above, the Commission appears to be correct in its tentative conclusion that the principal use of AVM frequencies is not for the provision of service to paying subscribers.⁴

³ The Interagency Group agrees with the Commission's view that applying competitive bidding requirements based on a standard of "any use, no matter how minimal" for services with paying subscribers would lead to inequitable results and be inconsistent with Congressional intent that auctions should be used only where a service is "principally" used for services to subscribers who pay compensation for such services. NPRM, p.12.

⁴ Electronic toll collection, which is the AVM service of immediate interest to the Interagency Group, does not meet the statutory "principal use" criterion. Although "subscribers" to the E-ZPass Plan may pay a monthly service charge to obtain and use electronic vehicle "tags" which permit such drivers to pay their tolls by electronic rather than manual means, this charge would not be "compensation" for a spectrum-based service, as contemplated by Section 309(j), but would be "incidental" to the provision of the non-spectrum-based service of providing access to and use of the toll roads, bridges and tunnels administered by the members of the Interagency Group. See Letter of John D. Dingell, Chairman, House Energy and Commerce Committee, to FCC Chairman James H. Quello, November 15, 1993 (explaining the Congressional intent that uses of spectrum which are "incidental to the provision of a different, and not necessarily spectrum-based, service" should not be subject to competitive bidding procedures.)

The Commission should exempt from its competitive bidding requirements any use of radio spectrum by a governmental or quasi-governmental entity for the purpose of deploying any advanced traffic management systems to achieve goals embodied in the Intelligent Vehicle-Highway Systems Act.

Whatever the outcome of the pending proceeding to revise the AVM service rules for the 902-928 MHz band, the Commission must consider the probability that electronic toll collection and other advanced traffic management systems implemented consistent with the objectives of the Intelligent Vehicle-Highway Systems Act of 1991, Pub. L. No. 102-240, 23 U.S.C. Section 307 note, may eventually be assigned to frequencies in different parts of the spectrum band.⁵

To the extent that such systems are implemented by State and local government entities or quasi-governmental entities, such as those which comprise the Interagency Group, such entities, as the Association of Public-Safety Communications Officials (APCO) has commented (p.2) with respect to public safety agencies, "will never be in a position to outbid commercial entities for spectrum, and should never be forced to 'buy' spectrum necessary to provide basic government services to the public."

Although Congress rejected a Senate provision that would have exempted State and local governmental entities from competitive bidding generally, NPRM, p.48, n.148, Congress adopted provisions in Section 309(j) which appear to obligate the Commission to limit

⁵ See, e.g., Comments of Saab-Scania Combitech in PR Docket No. 93-61 (urging 2450-2470 MHz for electronic toll and traffic management systems in accord with the European standard).

the exercise of its competitive bidding authority to avoid, among other things, ham-stringing State and local governments in the implementation of frequency-dependent public service projects such as deployment of advanced traffic management and other intelligent vehicle-highway systems.

As APCO has noted in its Comments (p.4), the Commission's new authority to use competitive bidding "is permissive, not mandatory, and does not override its higher public interest obligations" under the Communications Act. Similarly, Comments submitted by Motorola, Inc. (p.1-2 and n.3-5) focus the Commission's attention on certain provisions in Section 309(j) which establish Congressional intent that the implementation of competitive bidding must be consistent with the Commission's overarching obligation as spectrum manager to ensure the use of spectrum in the public interest.⁶

The Interagency Group believes these constructions of the statutory language and Congressional intent are correct, and should guide the Commission in taking appropriate steps in this rulemaking to ensure that competitive bidding does not apply to spectrum which is required by State and local governments in their implementation of advanced traffic management and other intelligent vehicle-highway systems.

As a result, the Interagency Group agrees with APCO (Comments, p.4) that, instead of exempting only "public safety" entities as it has proposed, NPRM, p.12, the best approach to reconciling its

⁶ See subsections (j)(6)(A) and (E) and (j)(7)(A) and (B).

public interest obligations with the potentially difficult-to-apply "principal use" limitation and other statutory requirements for implementing its competitive bidding authority would be for the Commission to adopt a general policy that competitive bidding will not be used in any radio service that has, or is likely to have, significant use by State and local government licensees, regardless of whether the radio service otherwise qualifies for competitive bidding under Section 309(j).

At minimum, the Interagency Group urges the Commission to adopt such a general policy of exemption for such radio services as are used by State and local government or quasi-governmental licensees for purposes of deploying electronic toll collection or other advanced traffic management systems in furtherance of the national policy goals embodied in the Intelligent Vehicle-Highway Systems Act.⁷

⁷ The Interagency Group notes that IVHS AMERICA, which serves as a utilized Federal Advisory Committee to the U.S. Department of Transportation, does not take a position on the applicability of competitive bidding other than to urge the Commission to "retain within its auction Rules sufficient discretion and flexibility to decide at the appropriate time whether the use of competitive bidding to assign licenses on any IVHS spectrum allocation will serve the public interest." Comments, p.6-7. While this posture is based on its view that the FCC cannot address the issue pending identification of a distributed IVHS communications architecture, IVHS AMERICA's statement that "the optimal deployment of the IVHS infrastructure may involve substantially increased participation of federal, state and local government entities in activities that may be otherwise viewed as commercial ventures" raises the problem of applying the statute's "principal use" standard, and provides a basis for concluding that an exemption for governmental entities should be included in the auction rules.

Respectfully Submitted,

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November 30, 1993

CERTIFICATE OF SERVICE

I, Brenda Chapman, a secretary with the law firm of Cohn and Marks, do hereby certify that a copy of the foregoing "Reply Comments of the Interagency Group" was hand delivered this 30th day of November, 1993 to the following:

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